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Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No. 539

FREDERICK A. COOK, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

REPORTED BELOW 19 Fed., (2nd), 626, (C. C. A.).

PETITION FOR WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.

FREDERICK A. COOK, PETITIONER,

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UNITED STATES OF AMERICA, RESPONDENT

Reported Below 19 Fed. (2nd), 826, (C. C. A.)

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Because recently, at a session thereof, held at New Orleans, Louisiana, on the 14th day of June, A. D., 1927, in an action wherein your Petitioner is Defendant in Error and Respondent is Plaintiff in Error, the United States Circuit Court of Appeals for the Fifth Circuit passed and entered a final order and judgment wherein grevious error was committed to the rights claimed by your Petitioner, all as shown by the transcript of the

record and proceedings of said Court filed herewith, your Petitioner prays this Honorable Court to grant its most gracious writ of certiorari, directed to the said United States Circuit Court of Appeals for the Fifth Circuit, to the end that the errors in the record and proceedings in said cause may be brought up and reviewed by this Court and thereupon revise and corrected; in support whereof your Petitioner respectfully makes the following statement of the matter involved:

On February 8, A. D., 1927, your Petitioner, who had been previously convicted on twelve counts of an indictment by which he was charged with having used the United States mails in executing a scheme to defraud, in violation of Section 215 of the Criminal Code, and who, on said date, was confined in the United States Penitentiary at Leavenworth, Kansas, serving a sentence of fourteen years and nine months imposed upon him by the District Court of the United States for the Northern District of Texas, Fort Worth Division, in Cause No. 2273, made application to the said District Court in said case for an order placing him upon probation for a period of five years, under the terms of the Act of March 4, 1925, commonly known as the Probation Act. (43 Stat. 1259). Your Petitioner having been convicted and sentenced, as aforesaid, on the 21st day of November, 1923, in said cause, appealed by Writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit, where said judgment of conviction was, in February, 1925, affirmed, and thereafter, without attempting to have said judgment reviewed by this Honorable Court, about the first of April entered the

said United States Penitentiary to commence the service of said sentence.

The term of court at which Petitioner was convicted and sentenced, had expired long prior to the passage of the Probation Act, and your Petitioner was in the Penitentiary at the time of filing his application for probation in the Court of Original Jurisdiction.

A hearing was had in the District Court upon the application of Petitioner and an answer thereto by the Government, in which it claimed that the application was without merit for that Petitioner had not been punished sufficiently for the offenses of which he was convicted and sentenced, and that the Probation Act did not authorize the District Court (being the Court of Original Jurisdiction) to place your Petitioner upon probation for two reasons: (1), because it did not change or alter the rule of law in force and effect at the time of the passage of said Act, that the Court loses all control of the judgment and sentence at the expiration of the term at which the same was entered, and, (2), that at all events the Act did not alter or change the then existing rule of law that upon the commencement of the service of the sentence, the Court loses all control of the judgment and sentence and was therefore powerless to place Pteitioner upon probation, as sought by him in his application. The Government further made the point that the Probation Act was unconstitutional, but this raises no serious question as we view it.

Upon said hearing, the Court being satisfied that the ends of justice and the best interest of the public, as

well as your Petitioner, would be subserved by the granting of said application, granted the same and entered its order and decree suspending the further execution of the sentence imposed upon Petitioner, placing him upon probation for a period of five years, with W. Erskine Williams, who was designated as special probation officer, and ordering the warden of the United States Penitentiary, at Leavenworth, Kansas, and all officers and agents in charge of said institution to forthwith release and discharge Petitioner from custody.

From said judgment the Government prosecuted a Writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court, on the 14th day of June, A. D., 1927, entered its judgment reversing the said judgment of the District Court, and rendering judgment in favor of the Governmnet, the basis of said reversal being that the District Court was without authority to enter said order, (1), because the term of Court at which Petitioner was convicted and sentenced had expired prior to the time probation was sought and granted, and (2), at the time of filing his application for probation he was confined in the United States Penitentiary serving his sentence.

Question To Be Determined

The question to be determined is whether or not the Probation Act passed by the Congress of the United States, March 4, 1925, authorized and empowers the Court of Original Jurisdiction to place upon probation a person convicted and sentenced at a term of Court which expired prior to the passage of the Act and of

course, prior to the time of seeking and obtaining probation, and who is serving a sentence in the penitentiary.

JURISDICTION

This Court has power to review said decision of the Circuit Court of Appeals on certiorari under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

REASONS FOR THE ALLOWANCE OF THE WRIT

It is respectfully submitted that the Court should grant this petition for the following reasons:

(1). Because the Circuit Court of Appeals for the Fifth Circuit in holding in this case that the Probation Act passed March 4, 1925, does not empower the Court of Original Jurisdiction to place upon probation a person convicted and sentenced at a term of Court which has expired, and who is serving a sentence in the penitentiary, rendered a decision in conflict with the decisions of three other United States Circuit Courts of Appeal, to-wit:

> The Ninth Circuit in the case of Nix vs. James, 7 Fed. (2nd) 590;
>
> The Seventh Circuit in the case of Kriebel vs. United States, 10 Fed. (2nd) 762;
>
> The Sixth Circuit in the case of Evans vs. the United States, 12 Fed. (2nd) 64.

In each of said cases said Circuit Court held that the Probation Act empowers the Court of Original Jurisdic-

tion to place upon probation a person convicted and sentenced at a term of Court which not only had long since expired, but had expired prior to the passage of the Act.

(2). Because the Circuit Court of Appeals for the Eighth Circuit entertains doubt on the subject, and in the case of United States vs. Glen Murray, No. 7736, on the docket of said Court, it has certified to this Honorable Court the following question:

> "Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L. Chap. 521, Page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?"

(3). Because the question is of great importance to the administration of the Criminal laws of the United States, has never been passed upon by this Honorable Court and should be settled, to the end that there may be uniformity of decision not only in the Circuit Courts of Appeal, but in the District Courts, there being conflict of decision in the District Courts as well, in that the United States District Court of Arizona, in the case of United States vs. Chafina, 14 Fed. (2nd) 622, and the United States District Court for the Southern District of California, in the case of United States vs. Nix, 8 Fed. (2nd) 759, held that the Probation Act has the effect of continuing control in the Court of judgment until the judgment is satisfied, and empowers the Court of Original Jurisdiction to place upon probation a per-

son who is serving his sentence in the penitentiary, while the following District Courts have held to the contrary:

United States District Court for the District of Kansas, in the case of Mouse vs. United States, 14 Fed. (2nd), 202;

United States District Court for the Western District of Arkansas, in the case of Davis vs. United States, 15 Fed. (2nd), 697;

United States District Court for the Northern District of Georgia, in the case of Archer vs. Snook, 10 Fed. (2nd), 567.

Respectfully submitted,

CALLAWAY & WADE.
Attorneys for Petitioner,
Frederick A. Cook.

CERTIFICATE OF COUNSEL

WE HEREBY CERTIFY that we have carefully examined the record, and in the light of its contents consider the petition for a Writ of Certiorari well founded, and that it is not interposed for the purpose of delay.

HERBERT C. WADE,
SAM J. CALLAWAY,
Attorneys for Petitioner.

The attorney for Respondent, United States of America, is the Hon. Henry Zweifel, United States District Attorney for the Northern District of Texas, at Fort Worth, Texas.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No.

FREDERICK A. COOK, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT

Reported Below 19 Fed. (2nd), 826, (C. C. A.)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GROUNDS OF JURISDICTION

This is a proceeding by which Petitioner, Frederick A. Cook, sought an order of the Court of Original Jurisdiction placing him upon probation for a period of five years and suspending the further execution of a sentence which, at the time of making his application he was serving in the United States Penitentiary, under the terms of the Probation Act passed by the Congress of the United States on March 4, 1925. (Com. S. Sec.

105644-5-105644-5c). The term of Court at which he was sentenced had expired. The District Court entered its order placing Petitioner upon probation for a period of five years, suspending the further execution of the sentence and directing that the officers in charge of the penitentiary forthwith release and discharge him. (R. 7, 8). On review by Writ of Error the United States Circuit Court of Appeals for the Fifth Circuit entered its final judgment reversing the judgment of the District Court and rendered judgment dismissing Petitioner's application for probation on the 14th day of June, A. D. 1927. (R. 55).

The grounds of the reversal and rendition by the Circuit Court of Appeals were that the Probation Act of March 4, 1925, did not empower the Court of Original Jurisdiction to place upon probation a person convicted at a term of Court which had expired, and who was serving a sentence in the penitentiary. The claim of Petitioner is that said act empowered the Court of Original Jurisdiction to place such person upon probation, notwithstanding the fact that the term of Court had expired and he was serving his sentence in the penitentiary.

The claim asserted is a substantial one, and the Supreme Court of United States has power to review on certiorari said decision of the Circuit Court of Appeals under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

The holding of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in direct conflict with the holdings of three other Circuit Courts of Ap-

peal, to-wit:

> The Ninth Circuit in the case of Nix vs. James, 7 Fed. (2nd) 590;
>
> The Seventh Circuit in the case of Kriebel vs. United States, 10 Fed.)2nd) 762;
>
> The Sixth Circuit in the case of Evans vs. United States, 12 Fed. (2nd) 64.

In addition to this, there is pending in the Supreme Court of the United States a certified question from the Circuit Court of Appeals for the Eighth Circuit, in the case of United States vs. Glen Murray, No. 7736, on the docket of said Circuit Court, which question is as follows:

> "Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L. Chap. 521, Page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?"

There is no uniformity of decision on this question in the United States District Courts for that the District Court for the District of Arizona, in the case of United States vs. Chafina, 14 Fed. (2nd) 622, and the District Court for the Southern District of California, in the case of United States vs. Nix, 8 Fed. (2nd), 759, held that the Act empowers the Court of Original JJurisdiction to grant probation even where the term of Court had expired, and the service of sentence had commenced, while the District Court for the District of Kansas, in

the case of Mouse vs. United States, 14 Fed. (2nd) 202, and the District Court for the Western District of Arkansas, in the case of Davis vs. United States, 15 Fed. (2nd), 697, and the District Court for the Northern District of Georgia, in the case of Archeer vs. Snook, 10 Fed. (2nd), 567, held to the contrary.

STATEMENT OF THE CASE

On February 8, 1927, Petitioner, Frederick A. Cook, who had previously and on November 21, 1923, been convicted in the United States District Court for the Northern District of Texas, on twelve counts of an indictment charging violation of Sec. 215 of the Criminal Code, and sentenced to serve a total of fourteen years and nine months in the United States Penitentiary at Leavenworth, Kansas, and to pay a fine of One Thousand Dollars ($1,000.00), on each of the twelve counts, and who entered the said penitentiary in April of 1925 and was then serving said sentence, filed his application in said District Court, for probation under the terms of the Probation Act passed by Congress on the 4th day of March, 1925. (R 1-4).

A hearing was had on said application and the answer thereto filed by the Government (R. 4-7) at the close of which the Court being satisfied that the ends of justice and the best interest of the public, as well as of the Petitioner, would be subserved thereby, on the 17th day of March, A. D., 1927, granted said application, placed Petitioner upon probation for five years, suspended the further execution of the sentence imposed and ordered that the warden and other officers in charge

of the penitentiary forthwith release and discharge Petitioner. (R. 7, 8).

On appeal by Writ of Error to the Circuit Court of Appeals for the Fifth Circuit said order of the District Court placing Petitioner upon probation, as aforesaid, was, on the 14th day of June, A. D., 1927, reversed and judgment rendered denying Petitioner's application for probation. (R. 55).

The grounds of said reversal and rendition were that the Probation Act did not empower the Court of Original Jurisdiction to place upon probation a person convicted at a term of Court which expired prior to the time of making his application for probation and in fact prior to the passage of the Probation Act and who, at the time of applying for probation, was serving his sentence in the United Stataes Penitentiary. The question to be determined is whether or not the Probation Act did empower the District Court to make the order placing Petitioner upon probation aforesaid.

Specification of Error

It was error for the Circuit Court of Appeals to hold that the Probation Act passed March 4, 1925, did not have the effect of continuing control in the Court rendering judgment until the judgment is satisfied, and that it did not empower the Court of Original Jurisdiction to place upon probation one convicted and sentenced at a term of Court which expired prior to making application for probation and prior to the passage of the Probation Act, and who, at the time of applying for proba-

tion and at the time the order was entered granting probation, was serving a sentence in the United States Penitentiary.

Argument

The provisions of the Probation Act passed March 4, 1925, insofar as they are pertinent are as follows: (Compiled Statutes 105644-5-105644-5c).

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that the ends of justice and the best interest of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the Court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The Court may revoke or modify any condition of probation, or may change the period of probation: Provided, that the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court the probation officer shall report to the Court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him or may extend the probation, as shall seem advisable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the Court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the Court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

It will be readily seen, on the face of the Act, under any construction, that it grants broad powers to the District Courts, and that it changes the rule of law laid down in the case of Ex Parte, United States, 242 U. S., 27, which in substance is that the District Courts had no power at that time to suspend the imposition or execution of sentence after conviction. This much will be conceded, and in deed, there is no authority whatsoever to the contrary, with the limitations only that the conviction take place after the passage of the Probation Act and probation be sought and granted before the expiration of the term of Court at which the judgment is entered and the service of the sentence has not commenced. It is our contention, however, that the Act is much broader and empowers the Courts of Original Jurisdiction to place upon probation persons convicted at terms of Court which expired long prior to the passage of the Act, and who, at the time of seeking and obtaining probation, have entered upon the service of their sentences; that the Probation Act, being a remedial statute, has the effect of continuing control in the Court of the judgment until the judgment has been satisfied, which in a criminal case where a sentence of imprisonment has been imposed, means until the sentence has been ocmpletely served.

IN SIMILAR CASE CERTIFIED QUESTION FROM EIGHTH CIRCUIT IS NOW BEFORE THE COURT.

Since the passage of the Probation Act there have been a number of cases construing the same. No case involving the question here presented has yet been de-

cided by the Honorable Supreme Court of United States, although at the present time there is pending therein a certified question by the Circuit Court of Appeals for the Eighth Circuit in the case of United States vs. Glen Murray, No. 7736, on the docket of said Circuit Court, which involves substantially the question to be determined here. In said case in the United States District Court for Nebraska, Murray pleaded guilty to violation of the National Prohibition Act, and on October 25, 1926, he was sentenced to a term of three months' imprisonment in the County Jail, and on the same day he was delivered by the marshall to jail keeper, and on that date commennced serving sentence. On October 26, 1'26, the following day, but during the same term of Court, the Court entered an order placing Murray on probation, and thereupon he was released from imprisonment to a special probation officer designated by the Court. The question certified by the said Circuit Court is as follows:

> "Did the United States District Court for the District of Nebraska have authority under the Act of March 4, 1925, 43 Stat. L. Cap. 521, Page 1259, to make, during the term at which sentence was imposed, the order placing defendant in error upon probation after he had commenced to serve the sentence?"

It will be observed that there is in said case involved only the question of whether or not the Probation Act had the effect of abrogating the well established rule that the Court can not in any manner interfere with the execution of the judgment and sentence after the

service thereof has been commenced, and that the question of the expiration of the term is not involved.

ADJUDICATED CASES IN WHICH THE HOLDINGS ARE IN CONFLICT WITH THE HOLDING OF THE COURT IN THE INSTANT CASE

The first case dealing with this question, so far as our search of the reports reveals, is the case of Nix vs. James, District Judge, 7 Fed. (2d), 590. Nix, who had been convicted and sentenced at a term of Court which had expired long prior to the passage of the Probation Act, made application to the Circuit Court of Appeals for the Ninth Circuit for a Writ of Mandamus, to compel the District Judge presiding over the Court in which Nix was convicted to hear and consider his application for probation. It appears that after conviction, Nix prosecuted and appealed by Writ or Error to said Circuit Court where the judgment of conviction was in all things affirmed, and that prior to entering the penitentiary to commence the service of his sentetnce, the Probation Act had been passed and thereupon he filed in the Court of Original Jurisdiction his application for probation. The District Court being of the opinion that it was without power to hear and consider the application, dismissed it and thereupon the Writ of Mandamum was applied for in the Circuit Court of Appeals. The Circuit Court granted the writ, and in an elaborate and well-reasoned opinion, pointed out that the Act in question was remedial in its nature, and since its terms are "shall have the power, after conviction or after a plea of guilty or nolo contendere for any

crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and place the defendant upon probation," and did not by its terms place any limit upon the time within which the power should be exercised, that it applied to cases of conviction before the passage of the Act, even though the term of Court had long since expired, and stated in substance that to hold otherwise would be reading into the Act a limitation on the power granted not written there by Congress. In the course of its opinion the Court made the following pertinent statements:

> "These provisions of the statute clearly authorize the district court to modify from time to time the sentence imposed on a defendant, even after the expiration of the term at which sentence is pronounced." And "The new power vested in the district courts is available to them 'after conviction or after plea of guilty or nolo contendere.' The statute does not say how soon after conviction or plea the power must be exercised. In view of the liberal construction to which the statute is entitled we cannot read into it a limitation on the power granted not written there by Congress."

After the Circuit Court in the Nix case had granted the mandamus, Nix applied to the District Court for probation and while refusing the same upon its merits, the District Court in its opinion in 8 Fed. (2d), 759, observed as follows:

> "It is my understanding that the opinion of

> the Circuit Court of Appeals, filed in this matter August 3, 1925, has the effect of continuing control in the court of the judgment until the judgment is satisfied. Accordingly, I shall deny the application for probation at this time, without prejudice to its renewal one year from the date upon which defendant shall enter upon the sentence imposed."

The case of Kriebel vs. United States, 10 Fed. (2d), 762, decided by the Circuit Court of Appeals for the Seventh Circuit, is one in which the facts, so far as they are pertinent here, are identical with those in the Nix case. Conviction was for the violation of Sec. 215 and Sec. 37 of the Criminal Code, a pententiary sentence and fine was imposed at a term of court which expired prior to the passage of the Probation Act, and after prosecuting an appeal by writ of error, (the Probation Act in the mean-time having been passed) Kriebel, before entering upon the service of his sentence, applied for probation, which was denied by the District Court upon the ground that it had no power to grant the same since the term of Court had long since expired. The Circuit Court, however, reversed the judgment and expressly approved the holding of the Circuit Court for the Ninth Circuit in the Nix case, with this distinction, however, that it was of the opinion that to grant probation would not change or modify the judgment or sentence, but merely suspend the execution thereof in the manner designated in the judgment, leaving the judgment and sentence, however, unchanged. In the course of its opinion the Court said:

> "We are concerned here with a grant of power. The statute fixes a time when the exercise of it may begin, providing that it may be done 'after conviction or after a plea of guilty or nolo contendere,' but there is no limitation in the statute that it shall not be exercised after some other event."

The case of Evans vs. District Judge, 12 Fed. (2d), 64, decided by the Corcuit Court of Appeals for the Sixth Circuit, is one in which the holdings in the Nix and Kriebel cases were expressly approved. Here, then, are three United States Circuit Courts of Appeal that have held that the Probation Act empowers the Courts of original jurisdiction to place upon probation persons convicted at terms of Court which expired long prior to the passage of the Act. The only distinction in these cases and the one at bar is that the applicants for probation had not, at the time they were granted probation, actually entered the penitentiary to commence service of their respective sentences. The holdings, however, are in direct conflict with the holding of the Circuit Court for the Fifth Circuit in the instant case.

The case of United States vs. Chafina, 14 Fed. (2d), 622, a District Court case, decided by Judge Jacobs of the District of Arizona, is directly in point, and we submit that the reasoning in the opinion is sound. Judge Jacobs said:

> "To hold otherwise would be as is said in the case of Nix vs. James, 7th Fed. 590, reading into the Act a limitation on the power granted, not

written there by Congress. I am of the opinion that the Act clearly vests power in the trial court to admit a defendant upon probation at any time after conviction, either before or after service of the sentence has commenced, and before the full term of the sentence has been served."

Cases Holding Contrary to Our Contention

There are at least three reported cases decided by District Courts which have held that the Probation Act does not grant the Court of Original Jurisdiction the power to place upon probation one who has commenced the service of a sentence of imprisonment:

Archer vs. Snook, 10 Fed. (2d) 567;

Davis vs. United States, 15 Fed. (2d 697;

Mouse vs. United States, 14 Fed. (2d) 202.

In the Archer vs. Snook case, 10 Fed. (2d) 567, Judge Sibley of the Northern District of Georgia, seems to place his holding that the Probation Act does not apply to a case where the applicant is serving his sentence in the penitentiary, primarily, if not entirely, upon the ground that the penitentiaries are usually situated a great distance from most of the Judges, and that it would involve much complication to place persons on probation after they have entered the penal institutions. We submit that there is no merit in this contention, and that a complete answer thereto is that it is no greater hardship to return a person from the penitentiary than

it is to place him there. The officers in charge of the United States Penitentiaries are agents of the executive department of the Government, a co-ordinate department, and it is upon the authority of the judgment and commitment of a Court that they receive and hold prisoners. As has been well stated, we are concerned here with a grant of power, and if Congress has seen fit to grant the power to the Courts of Original Jurisdiction, we submit that the distance of the penitentiary from the Judges furnishes no basis for concluding that the Act was not intended to apply to cases where the applicants are already in the penitentiary.

In the case of Davis vs. United States, 15 Fed. (2d) 697, Judge Youmans of the Western District of Arkansas, placed his holding that the Probation Act did not empower the Courts of Original Jurisdiction to place upon probation a person serving a sentence in the penitentiary upon two grounds, (1), that the term at which the applicant was sentenced had expired, and (2), that the Act in no way was applied after service of the sentence had commenced, holding that the act did not change or alter the pre-existing rules of law, with respect to losing control of the judgment at the expiration of the term and likewise at the commencement of the service of the sentence.

Judge Pollock, District Judge for the District of Kansas, in the case of Mouse vs. United States, 14 Fed. (2d) 202, took the position that while the Act applies notwithstanding the expiration of the term at which the sentence was imposed, yet it did not apply if service of

the sentence in a penitentiary had commenced, upon the ground that the Courts should not be permitted to invade the penal institutions of the country during the term of imprisonment and "after all jurisdiction over the subject matter and the person of the offender has been lost." We submit that there is no occasion for sounding a note of alarm if the Probation Act is to be construed so as to empower the District Courts to place upon probation persons serving sentences in the penitentiary, for if the District Courts can be entrusted with the discretionary power to impose sentences ranging from a dollar fine to many years in the penitentiary, they surely can be entrusted with the power to grant probation, in their discretion, to persons in prison, when it shall be made to appear to the satisfaction of such courts that the best interest of the public, as well as the applicants, will be subserved thereby. To say "after all jurisdiction over the subject matter and the person of the offender has been lost" is simply arguing in a circle, for the question to be determined is whether or not Congress, by the Probation Act, has continued control of the subject matter and the execution of the judgment in the Court of Original Jurisdiction until the judgment has been satisfied. If that power has been granted, then all jurisdiction over the subject matter and the person of the offender has not in fact been lost.

Statutory Construction

A cardinal rule of statutory construction is that where the terms of the statute are unambiguous and do not involve an absurdity, it is the duty of the Court to give

effect to the language as written regardless of any supposed notion as to what might have been intended by the law-makers or as to what might afterwards seem advisable that the law-making body should have provided for. This rule is no better illustrated than by the Honorable Supreme Court's interpretation of what is commonly known as the White Slave Traffic Act. In the famous Caminetti case, 61 L. Ed. 442, this Honorable Court held that irrespective of the fact that Congress might have intended the Act to apply only to commercialized vice or traffic in women for gain, and not to mere personal episodes between men and women, which was practically conceded, the act by its plain terms covered both situations, and that the Court could not by construction exclude from the operation thereof, cases of mere personal episodes. This Court Said:

> "It is contended that the Act of Congress is intended to reach only commercialized vice, or the traffic in women for gain, and the conduct of petitioner, however reprehensible in morals, is not within the purview of the statute, when properly construed in the light of its history, and the purposes intended to be accomplished by its enactment. It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making Body that passed it, the sole function of the court is to enforce it according to its terms. Where the language is plain and admits

> of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion."

In the case of Hamilton vs. Rathbone, 44 L. Ed. 219, the Supreme Court said:

> "But where the Act is clear upon its face, and when standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

In the case of Holy Trinity Church vs. United States, 143 U. S. 457, Justice Brewer, speaking for the Supreme Court, said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used. . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Applying this rule to the Act in question, we submit that it cannot logically be held that the Act does not apply to those persons confined in the penitentiary. Congress, for a purpose, wrote in the act "after conviction or after plea of guilty or nolo contendere" and "to suspend the imposition or execution of sentence" and the only limitation seems to be that "it shall appear to the satisfaction of the Court that the ends of justice and the best interest of the public, as well as the de-

fendant will be subserved thereby." Under the rules of statutory construction it should not be permissible for us to inquire into the uncertain question of what the individual members of Congress might have intended by the words, for certainly there is no ambiguity in them. Had it meant that the Act should apply only before sentence imposed the words "or execution of sentence" would not have been used, and since there is no limitation written into the statute as to how long after the imposition of sentence the power may be exercised, to place a limitation upon that power and hold that it may not be exercised at any time before the sentence has been satisfied, is to place a limitation thereon not written there by Congress.

Advisability of Construction Contended for

Were it permissible to consider what may have been in the minds of the individual member of Congress, still we see no reason for concluding that Congress should not have intended the statute to apply to those persons already serving their sentences. Certainly Congress was providing a remedy and had in mind that the existing laws were wholly inadequate in that the parole law which had long been in force and effect, the law allowing a certain time for good behavior (Comp. S. 10532) and the pardoning power vested in the President were wholly inadequate, otherwise it would not have thought that there was any necessity for providing a new remedy. The pardoning power in scope was broad enough to cover the case of every person convicted, but as a practical matter it was inadequate, and therefore the parole

law was passed. This law provided a remedy for only those persons who were in the penitentiaries and had served a third of their term of imprisonment (Comp. S. 10535). It did not cover the cases of persons sentenced to serve terms of imprisonment in jail. As the law had wisely surrounded the person charged with the commission of an offense with every safeguard to prevent his unjust conviction, undoubttedly Congress deemed it expedient and proper to surround those already convicted, or that might be convicted, with every safeguard against unjust punishment after conviction. The Government's position on the advisability of the construction of this statute, for which we contend, seems to be substantially the same as that expressed by Judge Pollock, to-wit: That to give such an interpretation to the probation statute would permit the courts to invade the penal institutions of the country and take therefrom persons serving their sentences. But why should this be alarming or be considered unwise? Surely the District Judges who have exercised the discretionary power of imposing sentences that might range from a one-dollar fine to many years in the penitentiary can be entrusted to administer the probation law fairly and to the best interest of society. In most instances they are far more familiar with the actual facts than any other person or body entrusted with the granting of any character of clemency. Usually they are in a far better position to discover the existence of facts and circumstances which point conclusively to the fact that the best interest of society and the convict will be best subserved by leniency being granted. So that from the standpoint of what might

now seem wise for Congress to have provided for, we submit that there is no logical reason why one should conclude that Congress did not intend the Act to apply to those persons serving their sentences.

It may be suggested by the Government that from the fact that the Committee Report on the bill in question shows that it was not intended to pass anything radical, that the Act should not be applied except to those cases that would arise in the future, or at least before the term of court at which the prisoner had been sentenced had expired, and in no event to those persons confined in the penitentiary, since this would abrogate the long existing law that after the term of court has expired the court loses control of the judgment, and likewise the long existing law that in the absence of statutory authority the court loses control when the person enters upon the service of the sentence. Of course a change was brought about by the passage of the Probation Act, but we do not think that any radical change can be held to have been effected thereby, even though the control of the judgment is vested in the trial court, until it has been fully satisfied. It is conceded by the Government, and as a matter of fact was decided in the case of Ex Parte United States 242 U. S. 27, that as the law then existed the court did not have the power to suspend the imposition of sentence after conviction. Certainly so far as suspending the imposition of sentence is concerned a very emphatic change in the law has been brought about by the passage of the Probation Act. The old law was overturned, and a new condition of affairs in this respect brought about. Certainly if the change

for which we contend might be considered radical, so should the change admittedly effected be considered radical.

Looking to Committee Reports and Congressional Debates for Aid in Interpreting the Act.

Assuming it to be proper to look to committee reports and congressional debates preceding the passage of the Probation Act, which we think is very doubtful, as the language of the Act seems to be plain, we submit that because these show an intention to pass a Probation Act in line with acts passed by the various states of the Union, is no ground for concluding that the Act in question was not intended to apply to those persons already serving their sentences in the penitentiary, for at least two of the State Statutes then in existence have been held to apply to persons serving their sentences:

Antonio vs. Milliken, 9 Ohio App. 356 (1918);
State vs. Teal, 108 S. C. 455; 95 S. E. 69 (1917).

It does not appear from the congressional record that in passing the Act in question Congress was attempting to pattern after any particular Probation Act, and since the State Statutes on this subject are by no means uniform, and under the language of some the Courts have held that persons already incarcerated are the beneficiaries thereof, and under the language of others they have held otherwise, the statute in question must be interpreted in accordance with its plain language.

Constitutionality of the Probation Act

As to the constitutionality of the Probation Act, we

do not think there is much ground for the entertainment of any serious doubt on this subject. To begin with, a Probation Act of this general character had the advance approval of the Supreme Court of the United States, 242 U. S., 27, in which the Court in substance recommended that such an act be passed to the end that the district courts might be in a position to deal more justly with those persons convicted of crime. In the second place, the act was specifically passed upon and upheld by the Circuit Court of Appeals for the Ninth Circuit in the case of Nix vs. James, 7 Fed. (2nd) 590, and the conclusion of the Court on this question in that case has been impliedly, if not expressly, approved by the decision of each of the courts that have passed on the Probation Act in any form. At all events no case has held or even indicated that the statute might for any reason be unconstitutional. Substantially the only ground advanced is that it might be an encroachment on the pardoning power of the President under the Constitution. The Parole Act passed June 25, 1910, was not considered as violative of the Constitution, or an encroachment on the pardoning power, and this statute has been expressly passed upon in the following cases:

Anderson vs. Carroll, 263 U. S., 192; 68 L. Ed. 247;

O'Brien vs. McClaughry, 209 Fed., 819;

Thompson vs. Duehay (D. C.) 217 Fed. 484, affirmed (C. C. A.) 223 Fed. 305.

While the pardoning power granted to the President is exclusive, the granting of parole under the Parole Act